No. 2393

IN

The United States Circuit Court of Appeals

for the Ninth Circuit

THE STEAMER "SAMSON" and BARGE No. 8, BARGE No. 9 and BARGE No. 27

COLUMBIA CONTRACT COMPANY,
a Corporation
CLAIMANT AND APPELLANT

SHAVER TRANSPORTATION COMPANY,
a Corporation
LIBELLANT AND APPELLEE

STANDARD OIL COMPANY OF CALIFORNIA,
a Corporation
RESPONDENT IN PERSONAM

Supplemental Brief on Behalf of Libellant and Appelle

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

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COLUMBIA CONTRACT COMPANY,
a Corporation,
Claimant and Appellant.

SHAVER TRANSPORTATION COMPANY,
a Corporation,
Libellant and Appellee.

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a Corporation,
Respondent in Personam.

Supplemental Brief on Behalf of Libellant and Appelle

Appeal from the District Court of the United States for the District of Oregon.

We feel that this brief is really unnecessary, but our duty not only to present the case of our client but to aid the court to the best of our ability, compels us to put before your Honors in

this manner two points which are not in our main brief and which we intended to cover at the oral argument. The allotted hour, however, was too short to discuss all of the many questions of fact in this case and therefore one of these points was barely touched upon in the last closing minutes of argument and the other was omitted entirely.

FIRST POINT: THAT PILOT SULLIVAN OF THE OIL BARGE DID NOT BLOW A DANGER SIGNAL.

On pages 102 to 108 of appellant's brief counsel has urged that, even conceding the collision took place at Hunts Mill Point as we contend, yet Pilot Sullivan of the oil barge was negligent in blowing the second passing whistle when at that very time he was becoming apprehensive; counsel urges that he should have blown the danger signal at that time and that his failure to do so constitutes negligence on the part of the oil barge, making a division of the damages necessary under the familiar rule.

In considering this, it is necessary to bear in mind two things. First—would the danger signal have been the proper signal? Second—if it would have been the proper signal, did the failure to give it contribute to the collision?

The danger signal was not the proper signal. Sullivan had blown one whistle, which had been accepted by the Samson, so the courses of the

two boats were agreed and understood. When Sullivan blew the second whistle he did not "fail to understand the course or intention" of the Samson (the only contingency in which the Pilot Rules provide for a danger signal). The course and intention of the Samson were clear, for she had accepted the first whistle; but Sullivan wanted to warn the Samson that she was crowding him toward the Oregon shore and that it was time the Samson should begin to execute the maneuvre of passing port side to port side. There was still time and space to effect this passage—the boats were five hundred feet apart —and Sullivan had a perfect right to rely upon the Samson's previous acceptance of the single whistle, and that she would haul off at the proper time.

It is noteworthy that at the time of this second passing whistle Sullivan's anxiety was not of collision but of getting aground. He still thought the Samson would pass. (Apostles, pp. 108-109, 178, 179, 185-190.) And the one whistle was given as the best means of communicating to the Samson that the oil barge was getting close to shore, and it was time for the Samson to commence to haul off to her right as agreed. We submit that the second passing whistle was the proper signal and that the danger signal at this time would have been improper.

Second—even if the failure to blow the danger signal be considered as an error, did it con-

tribute to the collision? It certainly did not. Jordan says he was already backing full speed astern at this time. That is all he could have done had he received a danger signal. So whether it was given or not made not a particle of difference in his conduct. A danger signal is a means of *communicating* to the *other* pilot that his course or intention is not understood. On receipt of it he is *compelled* to reverse and back full speed astern. (We believe the rules have since been changed in this respect.) That is what Jordan was doing; so what good would a danger signal have done him?

Counsel have not stated that Sullivan should have backed, but only that he should have blown the danger signal—*i.e.*, communicated to Jordan. If, however, counsel means it to be inferred that he should have backed at this time, we answer that such a maneuvre would have been, in our opinion, not only a violation of the rules of navigation but its probable result would have been to check the oil barge enough so that she, instead of the Henderson, would have been struck and the damages of this collision would have been far greater than they now are.

We have shown in our main brief (pages 37 and 38) that the negligence of the Samson, even judged by Jordan's own testimony, was gross, and that being so the Samson cannot bring about a division of damages by raising doubts as to

the conduct of the oil barge. It is said in the case of the Victory, 18 Sup. Ct. Rep. 149, 155:

"As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be clear and convincing, in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other.

"The recognized doctrine is thus stated by Mr. Justice Brown in The Umbria, 166 U. S. 404, 409, 17 Sup. Ct. 610: 'Indeed, so gross was the fault of the Umbria in this connection that we should unhesitatingly apply the rule laid down in The City of New York, 147 U. S. 72, 85, 13 Sup. Ct. 211, and The Ludvig Holberg, 157 U. S. 60, 71, 15 Sup. Ct. 477, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor.' "

The court said further:

"The Circuit Court of Appeals and the District Court arrived at different conclusions in respect of the Plymothian's entire freedom from fault. The District Court held that the Plymothian was without blame, while the Circuit Court of Appeals was of opinion that she was not wholly blameless, because she kept her course 'without taking any precaution whatever until too late, and when the pending col-

lision became inevitable.' Whether she may not have been slightly in fault, may be a close question. This is often so when subsequent knowledge of what might have prevented disaster tends to qualify the ~~injury~~ inquiry as to the prior duty to avert it. But, after all, the question is, as pointed out by Mr. Justice McLean in Williamson v. Barrett, 13 How. 101, whether it was the duty of the master, in the exercise of due care and caution in the management of his vessel, to give a particular order. And, on a careful consideration of the evidence, we think that the Plymothian was not bound to change her course, or to stop and reverse earlier than she did, and these are the only elements of fault imputed to her."

In connection with our claim that the Samson was grossly negligent for continuing to approach the oil barge at a speed of at least seven miles an hour down a strong current with an unwieldy tow, it is interesting to note that in this very case of the Victory the Supreme Court held the Victory at fault for going at a speed of five and one-half and seven knots an hour with a tide force of two knots. In condemning this conduct the court said:

"Testing the Victory's conduct by settled rules, she was plainly in fault for not keeping to the right, and in attempting to cross the Plymothian's course, and her speed renders

her conduct still more blameworthy. It does not seem to be controverted that at the time of leaving the lighthouse her speed was five and one-half knots through the water, and there was a tide force of two knots, which would make seven and one-half knots over the ground. The Circuit Court of Appeals found that, from Craney Island up, her speed through the water was six or seven miles an hour, with a two-mile tide assisting her, which would make her speed over the bottom eight or nine miles. Certainly she must be held to have known that she was approaching the Plymothian so as to involve the risk of collision, and should have slackened her speed, under rule 21, and have stopped and reversed sooner than she did, when she was informed by sight and hearing that her effort to crowd the Plymothian off her rightful course must be unsuccessful."

SECOND POINT: THAT SULLIVAN SAW BOTH LIGHTS OF THE SAMSON ALL THE TIME.

Appellant has based his appeal largely on the fact that Sullivan saw both side lights of the Samson continuously from the time she came in sight up in Bugby's Hole till the collision. This, counsel says, shows conclusively that our theory of the collision is impossible. On the contrary, it corroborates us. We touched on this point at the close of our oral argument, but so

hurriedly that we take this occasion to state our position more fully.

It only takes a glance at the charts of the river on file in this case to see that the current at Bugby Hole sets against the bluff; and this is the testimony of the river pilots. It only takes another glance at the charts to see that the natural tendency of the Samson swinging around the bend at a speed of seven miles an hour down the current of a June freshet, with a tow which she could hardly control, would be to be "set over" by the current toward the Oregon shore. This is apparent without the testimony of Pilot Jordan of the Samson. As a matter of fact, however, he has said repeatedly that such was the case. One instance is at Apostles, pp. 654-655, where he testified as follows:

> "Q. Then you had proceeded from the point 'B,' which is approximately 400 feet off this Puget Island shore, to the point 'F,' which is approximately 800 feet off the Puget Island shore, on a port helm all the time, and hadn't got— Instead of getting nearer to the island shore you had got further away from it.
>
> "A. I think she drifted down, yes, sir.
>
> "Q. Drifted down?
>
> "A. Away from the island, on account of the current setting her off."

He said again, on page 1114 of the Apostles, as follows:

"Q. I understand you, Captain, in rounding the point of Puget Island, that your vessel comes down, not straight down, but sort of sideways. Is that correct?

"A. That is correct.

"Q. That is usually the case, is it?

"A. Ordinarily, yes."

Compare also his testimony, quoted on pages 38 and 39 of our main brief, where he says that the Samson would not shove the scows over toward Puget Island. Also his testimony on page 765 of the Apostles, where he again speaks of the current setting him away.

It is evident that the Samson's course from the point where Sulivan first saw her to the place of the collision was not along a straight line drawn through her keel and projected forward to the place of collision. In other words, she was not *headed* directly for the place of collision. She was *headed* more down stream, and the momentum with which she rounded the bend, and the sweep of the current toward the bluff, kept setting her over toward the place of collision. As the oil barge hauled off to the right, and proceeded toward the place of collision, the Samson kept being set over so that she continually remained pointing at the oil barge, and of course both her side lights remained visible

to Sullivan until just before the collision. And that is the way he describes them. (Apostles, pp. 107, 108, 163.) So far from militating against our theory of this collision, the appearance of the Samson's lights, when one understands the bend of the river at this point, the current, and how the Samson was set over, as Jordan says, corroborates us exactly.

Moreover, it must be borne in mind that the vessels were nearly two miles apart at the first sight and that the Samson's side lights shone across her course at a slight angle, as illustrated in the diagram numbered 3 in appellant's brief. This would make them visible to the oil barge, two miles away, through quite an arc of a circle.

Respectfully submitted.

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